8/13/93

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF	)	
	)	
JEFFERSONVILLE BAPTIST SCHOOL,	)	Docket No. TSCA-V-C-029-92
	)	
Respondent	)	

ORDER DENYING COMPLAINANT'S MOTIONS FOR DEFAULT ORDER AND ACCELERATED DECISION AS TO LIABILITY

I. Preliminary Statement

This administrative proceeding was initiated by the issuance of a complaint and notice of opportunity for hearing by the United States Environmental Protection Agency, Region V (Complainant, EPA or Agency) pursuant to Section 207(a) of the Toxic Substances Control Act (TSCA), as amended, 15 U.S.C. § 2601 et seq., 15 U.S.C. § 2647(a). Title II of TSCA, 15 U.S.C. §§ 2641-2656, commonly known as the Asbestos Hazard Emergency Response Act (AHERA), was enacted for the purpose, among others, of requiring inspection for asbestos-containing material and the development and implementation of appropriate abatement plans and methods in the Nation's schools to protect school children and school employees from health risks posed by exposure to asbestos.[1]

Each Local Education Agency (LEA) as defined in Section 202(7) of the Act, 15 U.S.C. § 2642(7) and at 40 C.F.R. § 763.83, was required to "develop an asbestos management plan for each school, including all buildings that they lease, own or otherwise use as

[1]See 15 U.S.C. § 2641 and H.R. Rep. No. 763, 95th Cong., 1st Sess. at 5004 (1986).

school buildings, and submit the plan" to the appropriate agency designated by the governor of the state in which the LEA is located, by October 12, 1988.[2]

The complaint alleges that Jeffersonville Baptist School (Respondent or the School) violated the requirements of Section 205 of TSCA, 15 U.S.C. § 2645, and the "Asbestos Containing Materials in Schools" regulations promulgated pursuant to TSCA which are set forth at 40 C.F.R. Part 763, Subpart E. More particularly, the complaint alleges that Respondent, as an LEA, failed to develop and submit to the State of Indiana an asbestos management plan for school buildings pursuant to Sections 205(a) and (d) of TSCA, 15 U.S.C. § 2645(a) and (d) and 40 C.F.R. 763.93(a)(1), and is therefore liable for civil penalties under Section 207(a)(3) of TSCA, 15 U.S.C. § 2647(a)(3)[3] in the amount of $4,000.00.

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[2]40 C.F.R. § 763.93(a)(1). See also, Section 205(a) of the Act, 15 U.S.C. § 2645(a) which provides:

> Within 720 days after October 22, 1986 . . . a local education agency shall submit a management plan developed pursuant to regulations promulgated under Section 2643(i) of this title . . . to the Governor of the State in which the local education agency is located.

[3]Section 207(a)(3) of TSCA, 15 U.S.C. § 2647(a)(3) of AHERA provides as follows, in pertinent part:

> Any local education agency - . . .
> (3) which fails to develop a management plan pursuant to regulations under section 2643(i) of this title or under section 2644(d) of this title, is liable for a civil penalty of not more than $5,000 for each day during which the violation continues.

In response to the complaint, Mr. Atkins, the Pastor of the Jeffersonville Baptist Temple (Temple) sent a letter to EPA contesting the jurisdiction of the EPA over the Temple on the grounds that "there is an absolute wall of separation protecting the church from intrusion by the State." He also maintained that "Congress did not include any of the fifty states . . . into the definitions of 'state' of Section 2642(14)." As a result, he contended that AHERA has no application in Indiana.

Given the inability of the parties to reach a settlement in this matter, the Complainant filed a timely prehearing exchange in compliance with my letter directing the parties so to do. Respondent did not submit a prehearing exchange. Thereafter, I issued an order directing Respondent to show cause why the prehearing exchange or a motion for an extension of time in which to file the prehearing exchange had not been filed.

In response to my order to show cause, Pastor Atkins of the Temple, writing "in propria persona," stated that his letter was not an attempt to answer my order or my earlier letter directing a prehearing exchange but served to inform me of Respondent's position. In his letter Pastor Atkins stated that:

> [T]he Jeffersonville Baptist Temple has had an independent inspection of its church building in June of 1988. A reinspection was made in 1992. Although the man who inspected our church building was qualified to do so by the U.S.E.P.A., we had him do his inspections solely for the Jeffersonville Baptist Temple, and not for any governmental body. He prepared a management plan for us and a reinspection update. As per our Church's instructions, we asked him not to submit the management plan to any government official, as

> that would violate our religious convictions. We acted upon the recommendations of the independent inspector, except we refused to sign and send a copy of the management plan to any government official because to do so would violate our deeply held religious convictions by implying a surrendering of a vital and integral part of our faith.

Pastor Atkins goes on to detail his reasons for contending that EPA and I, as Presiding Officer, lack jurisdiction over Respondent in this matter. He restated his Constitutional objection, asserting that the "Temple is a local New Testament church . . . [which] demands all of her God-ordained unalienable rights . . . guaranteed by the First Amendment of the U.S. Constitution . . . ." He maintains that if Respondent were under the jurisdiction of the EPA or the Administrative Law Judge, it would "violate the First Amendment of the United States Constitution." He insists that neither the Temple nor the Church's educational ministry is an LEA. He maintains that the "Church's educational ministry does not meet in a 'private non-profit elementary or secondary school building.' The Church is not a not-for-profit corporation or association."

Finally, Pastor Atkins challenges my status as Presiding Officer contending that there is a conflict of interest in having an Administrative Law Judge in EPA decide whether EPA has jurisdiction over the Respondent and, if so, in ultimately judging the issues in the case.

By my order of March 10, 1993, Complainant was directed to respond to the allegations made in Respondent's letter of November 12, 1992. On April 9, 1993, Complainant filed a response

together with a motion for default order or in the alternative, a motion for accelerated decision.

Complainant's motion for a default order, cites as its basis Respondent's failure to file an answer to the complaint pursuant to 40 C.F.R. § 22.17(a)(1), and/or failing to comply with a prehearing order of the Presiding Officer pursuant to 40 C.F.R. § 22.17(a)(2). Complainant further argues that since the Respondent failed to develop a management plan pursuant to Section 203(i) of TSCA, 15 U.S.C. § 2643(i) and regulations thereunder at 40 C.F.R. Part 763, Subpart E, the civil penalty should be assessed at $4,000 pursuant to Section 207 of TSCA, 15 U.S.C. § 2647.

In the alternative, Complainant moves for issuance of an accelerated decision pursuant to 40 C.F.R. § 22.20(a) arguing that there are no genuine issues of material fact remaining regarding the alleged violations and the appropriateness of the amount of civil penalty to be assessed against the Respondent. Thus, Complainant argues that judgment as a matter of law should be issued in this matter.

Respondent has not replied to Complainant's motion for default order or in the alternative, accelerated decision.

II. Discussion and Findings

A. Motion for Default Order

Section 22.17(a) of EPA's Consolidated Rules of Practice (CROP) provides, in pertinent part:

> A party may be found to be in default . . . after motion or sua sponte, upon failure to comply with a prehearing . . . order of the Presiding Officer . . . .

Section 22.17(a) of the Rules, however, offers no specific requirements or criteria to guide me in deciding whether to enter a default order. Such a decision lies within my judicial discretion. This provision is analogous to Rule 55 of the Federal Rules of Civil Procedure (Fed. R. Civ. P.). While the Fed. R. Civ. P. are not applicable to the proceedings, consideration of the practice and precedent thereunder is not inappropriate where the applicable section of the CROP (Section 22.17) embodies concepts analogous to those in the Fed. R. Civ. P. It has been held under Rule 55 of the Fed. R. Civ. P. that "the default judgment must normally be viewed as available only when the adversary process has been halted because of an essentially unresponsive party."[4]

However, a diligent party is not entitled to a default order as a matter of right even when the unresponsive party is technically in default. In view of their harshness, default orders are not favored by the law as a general rule and cases should be tried on their merits whenever reasonably possible.[5]

As in Section 22.17, under Rule 55 of the Fed. R. Civ. P., disposition of a request for default judgment lies within the court's sound discretion. Where a defendant's failure to plead or

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[4]H.F. Livermore Corp. v. Aktiengesellschaft Gebruder Loepfe, 432 F.2d 689, 691 (D.C. Cir. 1970) (per curiam).

[5]Wright, Miller & Kane, Federal Practice and Procedure: Civil 2d Sections 2681-2685, pp. 398-429.

otherwise defend is merely technical, or where the default is de minimis, the court should generally refuse to enter a default judgment. On the other hand, where there is a reason to believe that defendant's default resulted from bad faith in his dealings with the court or opposing party, the district court may properly enter default and judgment against defendant as a sanction.[6]

Indications of Respondent's responsiveness or diligence can be gleaned from the record of this proceeding. Respondent corresponded through two letters. The first was addressed to the Complainant and the second to the Presiding Officer. Both contained arguments contesting the jurisdiction of the Agency and the Presiding Officer. Though the letters do not constitute an answer as required pursuant to 40 C.F.R. § 22.15, they do indicate, in effect, an attempt on the part of the Respondent to present its legal position as to the matter at hand. It must be remembered that Respondent is acting without the aid of counsel. ("I am not a lawyer. I have not hired a lawyer for he would have to act as an officer of the Court and thereby admit to jurisdiction where I maintain it does not exist."[7]) Respondent's filings have been submitted on the basis that an answer or any other official pleading by him would constitute an admission of jurisdiction thereby subjecting him to the proceeding. ("To answer their charges (even if patently false and given only to entrap us) grants

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[6]6 Moore's Federal Practice, § 55.05[2], p. 55-24 (1991).

[7]Pastor Atkin's letter to the Presiding Officer (November 12, 1992) at 9.

them jurisdiction where it does not exist. We do not admit guilt. We do not respond to specific charges. We cannot. Neither did we admit to being an LEA when we accepted their certified letter (which we rejected on one or two other occasions because the EPA addressed us as an LEA)."[8]) Though Respondent failed to submit an answer and further failed to comply with my directive to file a prehearing exchange and with my order to show cause, I decline to grant the default order on the basis that there was no bad faith, contumacy or unresponsiveness on the part of the Respondent so as to warrant the harsh penalty imposed by an order of default.

Complainant's motion for default order is, therefore, denied at this time.

B. Issues Raised by Respondent

The basic issue at hand is Respondent's challenge to the requirements of AHERA on jurisdictional and constitutional grounds. Respondent makes three arguments: first, the enforcement of AHERA would violate its constitutional rights found under the free exercise and establishment clauses of the First Amendment; second, under the provisions of AHERA, the Jeffersonville Baptist School is not an LEA or a school and that AHERA does not apply in the state of Indiana and, therefore, Respondent is not subject to the requirements of the Act; and third, it would be inappropriate for the Presiding Officer to rule on jurisdiction in this matter because the Presiding Officer is an employee of EPA and therefore a conflict of interest exists. I will consider each argument in order.

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[8] Id. at 8.

1. The Constitutional Issue: Respondent argues that compliance with AHERA violates the freedom of the Temple to practice its religion. The First Amendment provides that "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof." However, the Supreme Court has held that "the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'"[9] In that case the Court went on to conclude that the free exercise of religion clause of the Federal Constitution's First Amendment permitted a state to include religiously inspired use of peyote, a hallucinogenic drug, within the reach of the state's general criminal prohibition on use of that drug, where there was no contention that the state's drug law represented an attempt to regulate religious beliefs, the communication of religious beliefs, or the raising of one's children in those beliefs.

There is no evidence in this matter that the Act and its implementing regulations regulate religious beliefs of the Temple, the communication of those religious beliefs or the raising of the children of the Temple's members or the children who attend the Jeffersonville Baptist School in those beliefs. Assuming, without so deciding, that the AHERA requires the performance of an act

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[9]Employment Division v.Smith, 494 U.S. 872, 879 (1990) (quoting United States v. Lee, 455 U.S. 252, at 263 n.3. (1982) (Stevens J. concurring)).

which Respondent's religious beliefs forbids, the Free Exercise Clause nevertheless does not relieve Respondent of the obligation to comply with the requirements of AHERA because the law clearly is not directed to religious practice but instead is directed to the protection of human health and safety. In other words, AHERA is a neutral law of general applicability and Respondent has offered no evidence that compliance of the Act would restrict or interfere with its religious practices, the communication of its religious beliefs or the raising of the children of the Temple or of the School in those beliefs. Additionally, there is no indication that AHERA is otherwise unconstitutional. Consequently, Respondent's assertion that the First Amendment is a bar to the jurisdiction of EPA and the Presiding Officer or otherwise a bar to the enforcement of AHERA and its implementing regulations is rejected.[10]

2. The Statutory Issues: Respondent asserts that AHERA does not apply within the State of Indiana and that the Jeffersonville Baptist School is not an LEA or a school because "the definitions in this statute do not apply to a church school that has not opted to become a non-public school by seeking accreditation from the State," and "does not . . . comply with State education provisions" and is not a private or a parochial school by definition or practice.

a. Applicability of AHERA within Indiana: Respondent maintains that AHERA has no application in Indiana because the

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[10]See In the Matter of Cornerstone Baptist Church, TSCA-V-C-55-90, Order on Default (March 27, 1991).

definition of state in Section 2442(14) of the statute did not include any of the 50 states. The short answer to this contention is that the definition provides, in pertinent part: "The term 'state' means a State . . . ." Respondent does not contend that Indiana is not a State of these United States. Instead Respondent, in effect, insists that "[i]f Congress had meant to include Indiana or any of the fifty States United, into the definition of 'State' in Section 2642(14)" Congress, should have said that the term means "the 50 States." The short answer to this contention is that the United States Code provides that in determining the meaning of an Act of Congress "words importing the singular include and apply to several persons, parties or things.[11] The term State includes each and all of the 50 States. Therefore, I conclude that AHERA applies within the State of Indiana.

b. The LEA Issue: Contrary to Respondent's claims, I find that the Jeffersonville Baptist School is an LEA. An LEA is defined by Section 202(7) of AHERA, inter alia, as "the owner of any private, nonprofit elementary or secondary school building."[12] The term "nonprofit elementary or secondary school" is defined by Section 202(9) as "any elementary or secondary school (as defined in section 198 of the Elementary and Secondary Education Act of 1965 (20 U.S.C. 2854)) owned and operated by one or more nonprofit corporations or associations no part of the net earnings of which

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[11] 1 U.S.C. § 1.

[12] 15 U.S.C. § 2642(7).

inures, or may lawfully inure, to the benefit of any private shareholder or individual."[13]

Thus, for the definitions of elementary school and secondary school, one must turn to the definitions in the Elementary and Secondary Education Act of 1965.[14] That act in turn refers one to state law for a meaning of the terms. See 20 U.S.C. § 2891(8) and (21). The Indiana Code defines elementary school as "any combination of grades kindergarten, 1, 2, 3, 4, 5, 6, 7, or 8."[15] While the Indiana Code does not use the term secondary school, it defines the term "high school" as "any combination of grades 9, 10, 11 or 12."[16] A high school is commonly defined as a secondary school.[17] Since the Jeffersonville Baptist School offers education at grades kindergarten through grade 12, it falls within the

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[13]15 U.S.C. § 2642(9). See also, the House Report which stated that LEA "means the owner of any non-profit, public or private, elementary or secondary school building and any Coral educational agency as defined in section 198 of the Elementary and Secondary School Act of 1965. This definition covers . . . all public and private, elementary and secondary school authorities or owners." H.R. Rep. No. 763, 99th Cong., 2nd Sess. 5, reprinted in 1986 U.S. Code Cong. & Ad. News 5004, 5012 (emphasis added).

[14]Section 198 of the Elementary and Secondary Education Act of 1965, referred to in Section 202(7) of AHERA contained the definition of terms used in that Act (Pub. L. 89-10) and was classified to section 2854 of Title 20, Education, prior to the complete revision of that Act by Pub.L. 100-297, Apr. 28, 1988, 102 Stat. 130. For the definition of terms used in the Elementary and Secondary Education Act of 1965 after the revision by Pub. L. 100-297, one must refer to section 1471 of that Act, which is classified to section 2891 of Title 20.

[15]Ind. Code Ann. § 20-10.1-1-15.

[16]Ind. Code § 20-10.1-1-16.

[17]See, e.g., Webster's II New Riverside University Dictionary (1984).

definitions of both elementary school and high school set forth in the Indiana Code and, hence, is an elementary and secondary school under the Elementary and Secondary Education Act. Therefore, the Jeffersonville Baptist School is an elementary and secondary school pursuant to AHERA.

The remaining question is whether the Jeffersonville Baptist School is "owned and operated by one or more nonprofit corporations or associations no part of the net earnings of which inures, or may lawfully inure, to the benefit of any private shareholder or individual."

An association "is a term of vague meaning used to indicate a collection or organization of persons who have joined together for a certain or common object."[18] An aggregation of people joined together for the purpose of effectuating certain ideals of religious life may properly be included within the term.[19] A non-profit association is a group organized for purposes other than generating profit, such as a charitable, scientific or literary organization.[20] A nonprofit corporation may be organized for many different purposes including charitable, benevolent, eleemosynary, educational, and religious purposes.[21] Respondent does not contend that it operates for the purpose of making a profit or that any of its net earnings inure to the benefit of any individual.

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[18]Black's Law Dictionary 111 (5th ed. 1979).

[19]Words and Phrases, "Association."

[20]Black's Law Dictionary 953 (5th ed. 1979).

[21]Id. at 953.

Therefore, I conclude that the Jeffersonville Baptist School is a nonprofit elementary or secondary school and, hence, is an LEA as defined in AHERA. Respondent's arguments to the contrary are rejected. Respondent's contentions that it has not sought or received accreditation from the state, that it does not comply with State education provisions, and that it is not a parochial school are beside the point. None are requirements to qualify as a non-profit elementary or secondary school or as an LEA under AHERA. My conclusion is supported by the legislative history of AHERA.[22]

3. The Conflict of Interest Issue: The Respondent contends that there is a conflict of interest in my serving as Presiding Officer in this matter and thereby, in ruling on the question of EPA's jurisdiction since I am an employee of EPA. I must reject this argument because the decisional independence of Administrative Law Judges has been recognized and acknowledged by no less than the Supreme Court of the United States:

> [F]ederal administrative law requires that agency adjudication contain many of the same safeguards as are available in the judicial process. The proceedings are adversary in nature. See 5 U.S.C. § 555(b) (1976 ed.). They are conducted before a trier of fact insulated from political influence. See § 554(d). A party is entitled to present his case by oral or documentary evidence, § 556(d), and the transcript of testimony and exhibits together with the pleadings constitute the exclusive record for decision. § 556(e). The parties are entitled to know the findings and conclusions on all of the issues of fact, law, or discretion presented on the record. § 557(c).

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[22]See note 13, supra.

There can be little doubt that the role of the modern federal hearing examiner or administrative law judge within this framework is "functionally comparable" to that of a judge. His powers are often, if not generally, comparable to those of a trial judge: He may issue subpoenas, rule on proffers of evidence, regulate the course of the hearing, and make or recommend decisions. See § 556(c). More importantly, the process of agency adjudication is currently structured so as to assure that the hearing examiner exercises his independent judgment on the evidence before him, free from pressures by the parties or other officials within the agency. Prior to the Administrative Procedure Act, there was considerable concern that persons hearing administrative cases at the trial level could not exercise independent judgment because they were required to perform prosecutorial and investigative functions as well as their judicial work, . . . and because they were often subordinate to executive officials within the agency, ... Since the securing of fair and competent hearing personnel were viewed as "the heart of formal administrative adjudication," Final Report of the Attorney General's Committee on Administrative Procedure 46 (1941), the Administrative Procedure Act contains a number of provisions designed to guarantee the independence of hearing examiners. 5 U.S.C. § 3105 (1976 ed.). When conducting a hearing under § 5 of the APA, 5 U.S.C. § 554 (1976 ed.), a hearing examiner is not responsible to, or subject to the supervision or direction of, employees or agents engaged in the performance of investigative or prosecution functions for the agency. 5 U.S.C. § 554(d)(2) (1976 ed.). Nor may a hearing examiner consult any person or party, including other agency officials, concerning a fact at issue in the hearing, unless on notice and opportunity for all parties to participate. § 554(d)(1). Hearing examiners must be assigned to cases in rotation so far as is practicable. § 3105. They may be removed only for good cause established and

> determined . . . after a hearing on the record. § 7521.[23]

I conclude that there is no conflict of interest in my serving as Presiding Officer in this matter and in that capacity, ruling upon the issues raised by Respondent.

C. Complainant's Motion for Accelerated Decision

The complaint alleges that Respondent has failed to develop a management plan and has failed to submit to the State of Indiana proof that a management plan has been developed. As previously noted, Respondent alleges that it has had a management plan prepared but did not submit the plan to any government official because to do so would violate Respondent's religious convictions. Thus, Respondent has admitted the failure to submit a plan but has denied the alleged failure to have such a plan prepared. This clearly raises a genuine issue of material fact that precludes me from issuing an accelerated decision as to liability at this time.

Instead, I will give Respondent a final opportunity to file a substantive answer to the complaint and to comply with my letter directing a prehearing exchange.

D. Order

Respondent is hereby directed to file an answer to the complaint and notice of opportunity for hearing within twenty (20) days of receipt of this order. (See Section III "Opportunity to Request a Hearing" at pp. 5-6 of the complaint and notice of opportunity for hearing of March 30, 1992.) Respondent is also

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[23] Butz v. Economou, 438 U.S. 478, 513-14 (1978).

directed to comply with my letter of July 9, 1992, directing a prehearing exchange, and to submit said prehearing exchange with the answer to the complaint. Failure to comply with this order will result in my issuing the default order submitted by Complainant on April 9, 1993.

So ORDERED.

Henry B. Frazier, III
Chief Administrative Law Judge

Dated: August 13, 1993
Washington, DC

IN THE MATTER OF JEFFERSONVILLE BAPTIST SCHOOL, Respondent
Docket No. TSCA-V-C-029-92

Certificate of Service

I hereby certify that this Order Denying Complainant's Motions for Default Order and Accelerated Decision as to Liability, dated AUG 13 1993, was mailed this day in the following manner to the below addressees:

Original by Regular Mail to:

A. Marie Hook
Acting Regional Hearing Clerk
U.S. EPA, Region 5
77 West Jackson Boulevard
Chicago, IL 60604-3590

Copy by Certified Mail,
Return Receipt Requested to:

Attorney for Complainant:

Deborah A. Schmitt, Esquire
Assistant Regional Counsel
U.S. EPA, Region 5 (CA-3T)
77 West Jackson Boulevard
Chicago, IL 60604-3590

Attorney for Respondent:

Reverend William W. Atkins
Pastor
Jeffersonville Baptist Temple
5015 East Highway 62
Jeffersonville, IN 47130

Doris M. Thompson
Secretary

Dated: AUG 13 1993